11-27-2013

Taylor v. Riley Appellant's Reply Brief Dckt. 40599

IN THE SUPREME COURT OF THE STATE OF IDAHO

REED J. TAYLOR, an individual,

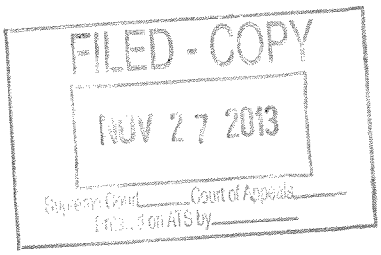
Plaintiff-Respondent,

vs.

RICHARD A. RILEY, an individual; HAWLEY TROXELL ENNIS & HAWLEY LLP, an Idaho limited liability partnership; SHARON CUMMINGS, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT M. TURNBOW and EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN, CHARTERED, an Idaho corporation,

Defendants-Appellants,

Consolidated Docket No. 40599-2012
Ada County No. 2009-18868



APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Richard D. Greenwood, District Judge, Presiding

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LIMITED SCOPE OF APPEAL ISSUES

As this Court is aware, after this interlocutory appeal was accepted, Taylor improperly sought appellate review by filing a *Cross-Appeal* on the following issues: 1) expansion of Idaho law governing the cause of action for negligent misrepresentation, and 2) assumed fiduciary duties by attorneys and breach thereof. Thereafter, this Court expressly dismissed Plaintiff's *Cross Appeal* in its Order of May 7, 2013. R., p. 1912. In the Order, this Court unambiguously held that scope of this permissive appeal was limited to **"the issues raised and decided in the *Memorandum Opinion and Order Re: Defendant's (sic) Motion for Summary Judgment and Reconsideration* filed October 24, 2012."** In blatant disregarded of this Court's Order of May 7, 2013, Taylor again erroneously raised these issues in his *Respondent Brief.* Neither Idaho's cause of action for negligent misrepresentation nor a cause of action for assumed duty/breach of fiduciary duty by an attorney were raised in *Defendants' Renewed Motion for Summary Judgment/Third Motion for Summary Judgment* or decided in the district court's October 24, 2012 *Memorandum Opinion and Order Re: Defendant's (sic) Motion for Summary Judgment and Reconsideration.* R., pp. 1804-1827 and 2556-2571.

In defending his inclusion of these issues in his *Respondent Brief,* Taylor argues "a cross appeal is not required" because "Taylor is not seeking to reverse a final judgment." In support of this contention, Taylor cites *Idaho Dev., LLC v. Teton View Golf Estates, LLC*, 152 Idaho 401 (2011). *Teton View Golf Estates, LLC* is distinguishable because the appellate review in that case occurred after a final judgment pursuant to Rule 54(b) of the Idaho Rules was entered. *Teton View Golf Estates, LLC*, 152 Idaho at 404. As this Court highlighted in its May 7, 2013

Order, the dismissal of Taylor's *Cross Appeal* was "without prejudice as to issues from any appeal that may result from a final judgment in this case." R., p. 1912.

In light of the limited scope of appellate review, this Court should not address or consider Taylor's arguments as to negligent misrepresentation as it relates to the independent cause of action under Idaho law or his issue of assumed duty/breach of fiduciary duty at this time.[1]

Accordingly, appellate review in this case should be narrowly focused on the issues of whether district correctly decided the issue of duty, whether res judicata bars Taylor's lawsuit and whether, as a matter of law, Taylor's professional negligence claim, if one exists, allegedly arising from the 1995 Opinion Letter is precluded by Taylor and AIA's 1996 Stock Redemption Restructure Agreement or the Subordination Agreement.

ARGUMENT

A. There are no compelling reasons to expand the scope of the duty owed by an attorney to a non-client in the context of drafting opinion letters and the district court erred in recognizing such a duty.

The potential scope of duty of an attorney giving rise to a professional negligence claim asserted by a non-client in Idaho has already been carefully analyzed and expressly limited by the Idaho Supreme Court. *Harrigfeld v. Hancock* (In re Order Certifying Question of Law), 140 Idaho 134, 137, 90 P.3d 884, 887 (2004) (holding that where, as a result of the attorney's negligence, the estate is not distributed in accordance with the testator's intent, the intended beneficiaries, though non-clients, may maintain an action against the attorney). Here, Taylor has asked this Court to expand the *Harrigfeld* exception, the sole Idaho exception to the prerequisite

[1] Obviously, if such arguments are properly presented to this Court in an appeal by Taylor following entry of a final judgment by the district court, if a final judgment is ever entered, this Court is then free to consider such issues and arguments.

requirement of the existence of an attorney-client relationship before pursuing a professional negligence action.[2] Taylor wants the Court to create a legal duty to allow Taylor to sue attorneys with whom he was not in an attorney-client relationship/privity based on case law from another jurisdiction. This is not the first time Taylor has asked this Court to make exceptions to the firmly established law requiring an attorney-client relationship to sue Idaho attorneys for professional negligence. *See Taylor v. Maile*, 142 Idaho 253, 127 P.3d 156 (2005); *Taylor v. McNichols*, 149 Idaho 826, 243 P.3d 642 (2010). In denying one of Taylor's previous requests, this Court said, "Reed cites to law from other jurisdictions, ignoring the well-established Idaho precedent, in arguing that third-party beneficiaries to an attorney-client relationship may have standing to pursue malpractice claims against an attorney." *McNichols*, 149 Idaho at 845. This Court continued "Reed offers no compelling reason why this court should expand its carefully reasoned analysis in *Harrigfeld.*" *Id.* As discussed herein, there are similarly no compelling reasons for this Court to expand the scope of professional obligations and potential legal liability for Idaho attorneys drafting opinion letters.

In this case, the act of drafting the Opinion Letter was done in the course of representing AIA, Riley and Turnbow's client. It was AIA who contracted with Taylor to provide him with an opinion letter, not Riley and/or Turnbow. Specifically, as provided in the 1995 Stock Redemption Agreement, in paragraph 2.5, "at closing, Company shall deliver the Shareholder the Down Payment ... together with the following duly executed documents ... (g) [a]n opinion of

[2] To the extent that Taylor advances the suggestion that *Harrigfeld* and the present case are factually the same because both cases attorneys in both cases intended to transfer property, such an argument is flawed. Taylor's allegations of professional negligence against Riley, Turnbow and Eberle Berlin are based on the drafting of an opinion letter and its contents. The Opinion Letter did not "transfer" or "intend to transfer property." Simply said, the act of drafting an opinion letter in an arm's length commercial transaction involving sophisticated parties represented by legal counsel is not the same as an attorney drafting testamentary documents.

the Company's legal counsel substantially in the form of Exhibit G hereto." R., pp. 2154-2155. Riley's and Turnbow's roles were to assist AIA in fulfilling its contractual obligation to Taylor. Accordingly, under the Idaho Rules of Professional Conduct, Riley's and Turnbow's legal "duties" were owed solely to their client, AIA, not Taylor. See *Bishop v. Owens*, 152 Idaho 617, 622 (2012). There was no "legal" connection between Taylor and Riley and/or Turnbow giving rise to any "duty." It is undisputed that Taylor was not a client of Riley or Turnbow. There was no contract between Taylor and Riley and/or Turnbow giving rise to any contract obligations owed by Riley and Turnbow to Taylor.[3]

In its October 24, 2012 Memorandum Opinion and Order, the district court stated that the issue of duty in this context was "an issue of first impression not previously decided by our appellate courts." R., p. 2567. As Turnbow and Eberle Berlin previously noted, a court should engage in a balancing of the harm in those rare situations when the court is called upon to extend a duty beyond the scope previously imposed or when a duty has not previously been recognized. *Turpen v. Granieri*, 133 Idaho 244, 248 (1999). See *Rife v. Long*, 127 Idaho 841, 846-847 (1995). Despite the district court's creation of a duty in a circumstance where such a duty had not been previously recognized, the district court did not engage in any balancing of the harms analysis. Taylor argues that the district court did not err because only a denial of the summary

[3] As this Court alludes to in *Bishop*, a "malpractice" action against an attorney could arise from a contract between an attorney and another person, even potentially a non-client. *Bishop*, 152 Idaho at 622. However, such undertakings are not required by the I.R.P.C. or the lawyer's general duty of care and are strictly contractual in nature. *Id.* Specifically, the contract basis of a legal malpractice action is the failure to perform obligations directly specified in a written contract between the individual asserting the malpractice claim and the attorney. *Johnson v. Jones*, 103 Idaho 702, 706-707(1982) (holding that a breach of contract claim would arise if the attorney did not do what he promised to do in the contract, *e.g.*, failing to draw up a contract of sale). Accordingly, it is possible that Riley and Turnbow could have contracted with Taylor to draft an Opinion Letter and under such a contract, Riley and Turnbow could be sued by Taylor for malpractice. However, that was not what happened and such an issue is not before the Court.

judgment motion was required, citing to Rule 52 of the Idaho Rules of Civil Procedure. However, the district court's failure to engage in balancing of the harms analysis is broader than just the "form of the order" as suggested by Taylor.

In determining whether a duty will arise in a particular context, factors to consider include the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. *Harrigfeld,* 140 Idaho at 138. As this Court discussed in *Harrigfeld*, the analysis of whether compelling reasons exist for extending the legal duty of an attorney to a non-client must be looked at in the big picture for all in society, not just the claimants litigating a particular matter. *Id.*

As discussed herein, the benefit of "protecting" highly sophisticated individuals represented by his or her own counsel while engaging in commercial transactions, the opinion recipient, from harm by giving such individuals another "pocket" to look in if a transaction goes south simply does not outweigh the burden imposed on attorneys by extending the scope of duties owed by an attorney to a non-client. Moreover, affirming the district court's holding that a professional negligence claim can be asserted by a non-client will have far reaching effects and highly detrimental consequences.

An opinion letter is just that, an opinion of one or more attorneys, which is to be used, along with other information, by a person or entity that the attorney does not legally represent, in

making his or her decision on how best to proceed and whether to enter into the commercial transaction. Said differently, opinion letters are a resource to advise an individual or a company contemplating engaging in a commercial transaction. An opinion letter is often just one of many resources evaluated by an individual or company contemplating a commercial transaction. For example, most individuals or companies contemplating a sophisticated commercial transaction, those who may receive an opinion letter, also retain their own legal counsel, have financial advisors participating in the evaluation of the proposed commercial transaction, and are often intimately familiar with company involved in the commercial transaction. In this case, Taylor had his own legal counsel and was the founder of AIA and the majority shareholder of AIA prior to his entry of the Stock Redemption Agreement with AIA. R., pp. 2153 and 269. Accordingly, the foreseeability of harm to an opinion recipient in the event of negligent preparation of the opinion letter is low. In contrast, as noted in *Harrigfeld*, the foreseeability of harm to an intended beneficiary in the event of the negligent preparation of the testamentary documents is extremely high.

Additionally, an attorney preparing an opinion letter does not directly bind the recipient of the letter to any legal transaction, unlike an attorney engaged in the preparation of testamentary instruments. In fact, in this case, upon receipt of an unsatisfactory opinion letter, Taylor had the right to terminate the Agreement prior to the closing date. R., p. 2184. Furthermore, there are numerous factors, wholly separate from an opinion letter, which may ultimately influence an individual or company's decision to enter into a commercial transaction. Similarly, there are numerous potential causes of financial harm to an individual or company entering into a commercial transaction. The cause of the financial harm to an individual or

company entering into a commercial transaction in many cases may be remote and completely unconnected to an attorney's negligent drafting of an opinion letter. There is no simply no clear-cut line of harm or ability to discern with any certainty whether an opinion recipient will suffer "injury" or financial loss as a result of a negligent opinion letter. There are risks involved with every contract and contractual risks cannot all be eliminated even with a qualified, non-negligent opinion letter. Imposing a legal duty, in essence, makes the attorney a potential financial guarantor of the contemplated transaction.

The facts in this case provide an example of the remote chance of harm occurring to the recipient even with an alleged negligently prepared opinion letter. Assume for the sake of argument that Taylor was correct on his allegation that the Opinion Letter was negligently prepared in 1995. Had Taylor exercised a different remedy to collect the money AIA owed him in 1995, rather than entering into the Restructure Agreement, Taylor may have fully obtained the money through foreclosure or other means and suffered no "harm." Moreover, any "harm" to Taylor from the allegedly negligent opinion letter was not even recognized by either Taylor's legal counsel or AIA's legal counsel for an extensive period of time, even after Taylor and AIA became involved in vexatious litigation (*i.e.*, approximately thirteen years). Even after the potential harm became clear, Judge Brudie still could have concluded that an exception to the illegality doctrine existed and enforced the contractual agreements, resulting in no "harm" to Taylor as far as Taylor's receipt of the monies due to him pursuant to the contract agreement. Hence, in this case, it simply cannot be said that to the extent the Opinion Letter was negligently written, there was a high degree of certainty that Taylor would be financially harmed by the Opinion Letter.

In this case, the harm analysis is further marred by determining "who" is harmed, which weighs against creating or extending a duty. In *Harrigfeld*, in the context of testamentary documents, the harmed party was clearly identified, the intended beneficiary. Here, the district court suggests that the universe of potential injured parties is limited to those to whom the letter is addressed. R., p. 2568. This statement is an over simplification. Opinion letters are often addressed to corporations. Corporations are often complex entities. For example, in this case, AIA Services Corporation was the parent holding company of Universe Life Insurance Company, AIA Insurance, Inc., and Farmers Health Alliance Administrators, Inc. R., p. 2172. While the Opinion Letter was written to "Reed Taylor," it is important to recall that prior to the execution of the 1995 Stock Redemption Agreement, Reed Taylor was the majority shareholder in AIA Services and by virtue of the company structure, he had interests in Universe Life Insurance Company, AIA Insurance, Inc., and/or Farmers Health Alliance Administrators, Inc. R., p. 269. "Reed Taylor" potentially wore many hats. For instance, perhaps the allegedly negligent Opinion Letter harmed "Reed Taylor," in his role as a shareholder in the subsidiary companies. The universe of potentially injured parties is not as narrow as argued by Taylor and the district court and, certainly not as clear-cut as in *Harrigfeld.*

Moreover, if an attorney is held to the standard of care of drafting "non-negligent" opinion letters, as proposed by the district court, Idaho attorneys will likely no longer draft opinion letters. Malpractice carriers for Idaho attorneys will simply not take the risk of insuring an attorney issuing opinion letters and could conceivable limit risk attributed previously issued opinion letters. This case is provides a good example. Here, Taylor alleged, fourteen years after the fact, that Riley and Turnbow's Opinion Letter was negligently drafted, in part, because the

Opinion Letter failed to sufficiently describe the attorneys' underlying reasoning leading to or giving rise to the attorney's "ultimate" opinion. This highlights the huge potential exposure of an attorney drafting an opinion letter for a non-client under the district court's ruling. If the duty is extended, the attorney could be found to have negligently drafted an opinion letter, regardless of whether the "ultimate" opinion was correct or incorrect. Additionally, in the event that the contemplated commercial transaction fails to yield the results the opinion recipient desired, to the extent the duty is expanded, the attorney who drafted the opinion letter would inevitably be the target of high stakes malpractice claims. It is doubtful that malpractice insurers would ever take on that risk, especially given the highly grey area that may be regarded as "negligence."

Additionally, other forces governing an attorney's conduct adequately satisfy the interests of ensuring honesty and that sound professional opinions are given in opinion letters. There is no need to create or extend the legal duty. For instance, Rule 4.1 of the Idaho Rules of Professional Responsibility provides that in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person. Additionally, the attorney must still answer to his or her client. The attorney's professional conduct is undisputedly governed by broad and far-reaching obligations and duties set forth in the Idaho Rules of Professional Responsibility.[4] Work done on behalf of a client, including drafting of opinion letters, must conform to such obligations and fulfill the attorney's duties to the client.

[4] Taylor argues that attorneys who draft erroneous/negligent opinion letters should be held to be responsible for their wrong-doings. However, what Taylor fails to consider is that an opinion letter is issued in the scope of representing a client and the attorney is most certainly not excused or immune from a malpractice action asserted by his or her client. Said differently, AIA could have filed a malpractice action against Riley and Turnbow if the Opinion Letter was in fact negligent and damaged AIA (*e.g.*, AIA incurred attorney fees litigating the legality of the agreements between AIA and Taylor and could have potentially argued it would not have incurred such fees but for the Opinion Letter).

Hence, the threat of an attorney knowingly issuing dishonest or unsound professional opinion letters is quite minimal.

In sum, the Idaho Supreme Court engaged in carefully reasoned analysis in reaching its decision in *Harrigfeld* and created a very narrow exception to the bright-line privity rule in Idaho. In 2010, Taylor could not offer a compelling reason for the Court to create an additional exemption to the prerequisite requirement of the existence of an attorney-client relationship in *McNichols*. Taylor has not offer a "compelling reason" warranting the creation of another exception in Idaho to the well-established law that an attorney does not owe a non-client a duty. Accordingly, this Court should reverse the district court's duty ruling and remand for dismissal.

B. *Res Judicata* should bar Taylor's professional negligence claim.

1. Same Parties

Under Idaho law, to be privies, a person not a party to the former action must "derive" his interest from one who was a party to it. *Kite v. Eckley*, 48 Idaho 454, 459, 282 P. 868, 869 (1929). Riley and Turnbow worked jointly on revision, editing and finalizing the subject opinion letter. R., pp. 1850-1851. Riley and Turnbow were member attorneys of the same law firm. Additionally, in Riley #1, Turnbow's and Eberle Berlin's interests arising from Taylor's claim of malpractice related to the Opinion Letter were adequately represented by Riley.[5] *See Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir. Tex. 1977). Under the doctrine of *res judicata*, Turnbow and Eberle Berlin should be found to be in privity with Riley. To the extent that *res judicata* bars further litigation against Riley, it similarly bars

[5] To be consistent with Defendant Riley, *Taylor v. McNichols* will be referenced herein as Riley #1 rather than Hawley Troxell #1 as it was originally referenced.

litigation against Turnbow, Riley's partner in drafting the opinion letter, and Riley's and Turnbow's joint firm, Eberle Berlin.

Taylor's argument in his *Respondent's Brief* that Riley's privity was with Hawley Troxell, not Turnbow and Eberle Berlin is misplaced. Riley was a named party in the consolidated litigation of Riley #1. While Riley may have been in privity with Hawley Troxell on some claims in that litigation, there would also be privity between Riley and Turnbow and Riley and Eberle Berlin with regard to Taylor's claim of malpractice related to the Opinion Letter. Thus, Turnbow and Eberle Berlin have satisfied the first prong of *res judicata.*

2. Same Transaction

As discussed in *Riley's Appellant Brief* and *Reply Brief* and herein, Riley #1 and Riley #2 both undisputedly arose out of the Stock Redemption Agreement and both contain claims by Taylor for professional negligence. "A transaction may be a single transaction despite different harms, substantive theories, measures or kinds of relief." *Restat 2d of Judgments, § 24, comment c* (1982). "In the more complicated case where one act causes a number of harms to, or invades a number of different interests of the same person, there is still but one transaction; a judgment based on the act usually prevents the person from maintaining another action for any of the harms not sued for in the first action." *Id.* Such transactions are still considered "to be single transactions despite legal theories being depend on different shadings of the facts or emphasizing different elements of the facts." *Id.*

In Idaho, it is well established that under the doctrine of *res judicata*, a cause of action can be barred by a prior adjudication even though the theory of liability and supporting evidence differ from the cause of action actually litigated in the prior lawsuit. *Andrus v. Nicholson*, 145 Idaho 774,

777-778 (2008). For example, in Andrus' 2003 lawsuit, the Andruses sought the right to access their mining claims by using roads crossing the Nicholson's property. *Andrus*, 145 Idaho at 777-778. The Andruses alleged various theories under which they claimed entitlement to use roads including, but not limited to: (1) that the roads were public roads; (2) that they had a prescriptive easement to use the roads; (3) that they had an implied easement or easement by necessity to use the roads; (4) that they had a contractual right to use the roads; and (5) that they had a "statutory right" to use the roads pursuant to Idaho Code § 47-901. *Id.* In a subsequent lawsuit, the Andruses sought the right to use the roads by alleging that they were entitled to condemn a right of way over them. *Id.*

In deciding the "same claim" or "same transaction" prong of *res judicata*, the Idaho Supreme Court held that the condemnation cause of action arose out of the same transaction as the causes of action alleged in the prior lawsuit. *Id.* The Court noted such a claim was another theory under which the Andruses were seeking to obtain the same result that they sought in the first lawsuit-the right to use the roads across the Nicholson's property. *Id.* Said differently, the condemnation proceedings could have been, and should have been, brought in the first "roads" lawsuit and attempts to do so in subsequent litigation would not be permitted. *Id.*

In Riley #1, Taylor's fourth cause of action alleged that Riley owed Taylor "a duty of care to provide legal services...professional legal advice and legal representation in keeping with the standard of care in the legal profession" and that Riley's acts "constituted professional negligence." R., p. 644. Taylor's professional negligence claim in Riley #1 was based, in part, on the fact that Riley drafted an Opinion Letter opining on the Stock Redemption Agreement. R., p. 641, ¶ 53.

Taylor continued in Riley #1 alleging that Riley's conduct was counter to the opinions Riley provided to Taylor in the Opinion Letter. *Id.*

In Riley #2, Taylor again alleged that Riley owed him a "a duty of care to provide ... professional legal advice in keeping with the standard of care in the legal profession." R., p. 42, ¶ 42. Taylor's allegations of "professional negligence" again arise out of the drafting and issuance of the Opinion Letter. *Id.*

Even the district court initially seemed to recognize that Riley #1 and Riley #2 arose out of the same transaction. In granting Hawley Troxell's *Motion for Summary Judgment* on *res judicata*, the district court stated as follows in its May 10, 2010 Order:

> The gist of Taylor's malpractice claim, albeit somewhat over-simplified, is that Riley and Turnbow were negligent in performing legal work related to the Stock Redemption transaction. His complaints related specifically to the opinion letter, but also include references to other legal work performed.

R., p. 1681. Hence, Riley #1 and Riley #2 arise out of the same transaction and *res judicata* should bar Riley #2.

To the extent that this Court concludes that Riley #1 and Riley #2 have slightly different legal theories that depend on different shadings of the facts or emphasize different elements of the facts, the Court should nevertheless acknowledge that Taylor is seeking the same result that he sought in Riley #1—to obtain damages based on the Opinion Letter drafted by Riley and Turnbow. Thus, this Court should reverse the district court's ruling and apply res judicata to bar Taylor's professional negligence claim against Riley and those in privity with Riley, Turnbow and Eberle Berlin. Reversal is warranted, especially in light of the district court's seemingly inconsistent approach of holding *res judicata* barred Taylor's claims against Hawley Troxell and not applying

res judicata to Riley, Turnbow and Eberle Berlin after recognizing the similarities in the "transaction" between Riley #1 and Riley #2.

In Taylor's *Respondent Brief*, he argues, citing to *U.S. Bank Nat'l Ass'n v. Kuenzli*, 134 Idaho 222, 226 (2000), that a claim based on the facts occurring after a first lawsuit is not one that might or should have been litigated under the first suit. Taylor suggests that a second lawsuit should be permitted when "justified by post-judgment developments." He argues it was impossible for Taylor to assert claims that the opinion letter was incorrect until Judge Brudie entered his June 17, 2009, Order in *Taylor v. AIA*, finding the Stock Redemption Agreement illegal. He also suggests that because Judge Brudie's illegality Order was not issued for six months after Riley #1 was dismissed, his claims against Riley, Turnbow and Eberle Berlin were not ripe until after Riley #1 was dismissed.

The critical fact that Taylor fails to acknowledge is that Judge Greenwood held that the statute of limitations on Taylor's professional negligence claim in the present matter began to run in April 2008 when the issue of illegality was raised in the *AIA* litigation, not June 17, 2009. R., p. 1688. Riley #1 was not dismissed until December 23, 2008. Accordingly, it was not "impossible" for Taylor to assert his professional negligence cause of action specifically regarding the Opinion Letter in Riley #1, to the extent that this Court concludes such a claim was not already included in Riley #1. Moreover, Taylor's claims for professional negligence were undisputedly "ripe" before the dismissal of Riley #1. In fact, Taylor had approximately eight months to plead any professional negligence actions in Riley #1 that Taylor wanted to or needed to against Riley and those in privity with him arising out of the Stock Redemption Agreement and the Opinion Letter.

In his *Respondent Brief*, Taylor badly misconstrues Riley, Turnbow and Eberle Berlin's respective Motions to Stay Discovery and statements made in support of such motions. Such Motions were made following Judge Greenwood's denial of Motions seeking summary judgment based on *res judicata*. In the context of that procedural posture in the underlying litigation, the statements filed in support of the Motions to Stay Discovery were correct when the Motions were filed. If *Taylor v. AIA* was reversed, the scope of the breach of malpractice alleged by Taylor against Riley and Turnbow would either be non-existent or substantially different. As the district court agreed, it made no sense to go forth with extensive discovery until the scope of Taylor's malpractice claim was settled by a decision in *AIA*. Unlike alleged by Taylor on appeal, statements filed in support of the Motions to Stay Discovery in no way "admit" or concede Taylor's argument that it was "impossible" to file any malpractice claims against Riley, Turnbow and Eberle Berlin until Judge Brudie issued his illegality decision on June 17, 2009 in the *Taylor v. AIA* litigation.

Finally, in evaluating *res judicata*, the district court should have applied a broad transactional approach, rather than using the "gravaman of the complaint" test. *Andrus,* 145 Idaho at 777-778. Application of the "gravamen of the complaint" was erroneous and the district court's rulings should be reversed.

3. Final Judgment

As previously discussed, the district court entered a final judgment in Riley #1. This prong of *res judicata* is satisfied.

In sum, this Court should reverse the district court's erroneous holding that Taylor's professional negligence claim against Riley, Turnbow and Eberle Berlin was not barred by *res judicata* and remand for dismissal.

C. Taylor cannot establish any damages proximately caused by the 1995 Opinion Letter and, accordingly, summary judgment should be entered in the Turnbow's and Eberle Berlin's favor, thereby dismissing Taylor's remaining cause of action.

When AIA first failed to pay Taylor, he was presented with a number of choices. Under the 1995 Stock Redemption Agreement, Taylor's potential remedies included accelerating the debt owing and sue for the debt, and/or repossession of the pledged stock and sale of the stock in a commercially reasonable manner. R., pp. 2156-2159. Rather, Taylor opted to waive these remedies and enter into a new and replacement contractual agreement with AIA, the 1996 Stock Redemption Restructure Agreement, with independent counsel representing him. R., pp. 1836-1837. Idaho law does not restrict the freedom of parties to contract and negotiate the terms of the contract, as was done by Taylor and AIA. *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 499 (1970). In fact, Idaho law even permits a person to contract away his legal rights and remedies for future negligence. *Rawlings*, 93 Idaho at 499. Hence, according to basic contract law, the language of the 1996 Stock Redemption Restructure Agreement was the language that governs. In this case, the district court correctly held that in Taylor's lawsuit against AIA, he sued AIA on the 1996 Stock Redemption Restructure Agreement, not the 1995 Stock Redemption Agreement. R., p. 2563.

Of significance to the issues on appeal in this lawsuit, the 1996 Stock Redemption did not contain an Opinion Letter drafted by Riley and Turnbow. As a matter of law, Taylor cannot rely on the 1995 Opinion Letter in making his decision to enter the 1996 Stock Redemption Restructure Agreement. An opinion letter speaks only of its date. *Accord* § 9; *TriBar Report* §

1.2(b). Hence, logically, an opinion recipient cannot claim reliance on a previously given opinion in a subsequent transaction occurring on a later date. *Id.* at § 3.9.

In this case, the August 15, 1995 Opinion Letter expressly stated that the Opinion Letter was given "pursuant to Section 2.5(j) of the Stock Redemption Agreement dated July 22, 1995." R., p. 2224. Taylor has even acknowledged that the 1995 Opinion letter "given pursuant to Section 2.5(j) of the Stock Redemption Agreement dated July 22, 1995" was inapplicable to the 1996 Stock Redemption Restructure Agreement. R., pp. 1823-1847. Taylor actually filed a professional negligence action against the Washington State counsel who represented him when he entered into the 1996 Stock Redemption Restructure Agreement. Taylor alleged that his Washington State attorneys, Scott Bell and Frank Taylor, breached their respective professional obligations to him in the context of the 1996 Stock Redemption Restructure Agreement by failing to request a new opinion letter from AIA's legal counsel for that contractual agreement. R., pp. 1823-1847 and 1838.

Additionally, the district court erred in trying to "sidestep" the issue that the 1996 Stock Redemption Restructure Agreement did not contain an opinion letter. The court, in trying to justify a potential causal link for Taylor's malpractice damages, noted that the August 1, 1995 Promissory Note was not "superseded or replaced" in the 1996 Stock Redemption Restructure Agreement. Therefore, according to the district court, despite legal authority clearly establishing that an opinion letter speaks only of its date, the 1995 Opinion Letter would still be a document that Taylor could rely on in the context of his decision to enter the 1996 Stock Redemption Restructure Agreement. Moreover, according to the district court, the 1995 Opinion Letter would be a document, if negligent, that could provide Taylor a cause of action against the

attorneys who drafted the Opinion Letter for the damages allegedly flowing from the 1996 Stock Redemption Restructure Agreement.

As previously discussed at length, to the extent that a portion of the agreement contained in the 1995 Promissory Note remained viable in the 1996 Stock Redemption Restructure Agreement (*i.e.*, the concept of AIA owing Taylor money), the language and the terms of the August 1, 1995 Promissory Note were significantly different than the "original note" in the 1995 Stock Redemption Agreement. The August 1, 1995 Promissory Note in the context of the 1996 Stock Redemption Restructure Agreement was simply not the same document that Riley and Turnbow opined on when they authored the Opinion Letter. Accordingly, the district court erred in "finding" a causal damage link in the subsequent transaction. *See Isaak v. Idaho First Nat. Bank*, 119 Idaho 988, 812 P.2d 295 (Ct. App. 1990).

In this case, the facts plainly show Riley and Turnbow authored the Opinion Letter, on August 15, 1995, opining on the 1995 Stock Redemption Agreement, an Opinion Letter which addressed only the 1995 Stock Redemption Agreement and the agreements underlying this Agreement (*i.e.*, the promissory note). R., p. 2224. Subsequently, Taylor decided to change the terms of both the Redemption Agreement and, in essence, the Promissory Note in entering into the 1996 Stock Redemption Restructure Agreement. After Taylor's litigation against AIA to enforce his contractual agreement with AIA failed, Taylor then opted to file the subject litigation against AIA's legal counsel for the Opinion Letter they authored in 1995. The problem with Taylor's professional negligence cause of action (to the extent that such a cause of action even exists in Idaho) is that as, a matter of law, he cannot establish any damage proximately caused by the content of the Opinion Letter. The content of the Opinion Letter was restricted to the

contractual agreement in place at the time the Opinion Letter was offered. Specifically, the contractual agreement "connected to" the Opinion Letter, the 1995 Stock Redemption Agreement, actually ceased to exist in 1996 under basic contract law.[6]

Moreover, Judge Brudie's findings, and this Supreme Court's affirmation of those findings, that the contract between AIA and Taylor was illegal and unenforceable is not determinative to this issue.[7] For example, assume that Judge Brudie concluded that the contract between Taylor and AIA (embodied in the 1996 Stock Redemption Restructure Agreement) was legal and enforceable. Even if the 1995 Stock Redemption and the 1996 Stock Redemption Restructure Agreement were legal, to the extent that Taylor's claimed damages for professional negligence flows from the contract connected to the Opinion Letter, Taylor would still be precluded from pursuing such a cause of action because the contract giving rise to Taylor's alleged damage ceased to exist after 1996.[8]

Hence, as a matter of law, Taylor cannot establish any damages proximately caused by the 1995 Opinion Letter authored by Riley and Turnbow. The district court erred in its denial of

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[6] The district court's thoughts on what a "jury" might conclude on proximate cause is unnecessary in an order denying a motion for summary judgment based on a legal question posed to the court. Additionally, the district court's analysis of proximate cause is incomplete. *Munson v. State, Department of Highways*, 96 Idaho 529, 531 P.2d 1174 (1975). Cause-in-fact requires the plaintiff to show that the injury would not have occurred but for the defendant's conduct, while legal cause requires the plaintiff to establish that the defendant's conduct was a substantial factor in bringing about the damage. *Munson*, 96 Idaho at 531.

[7] To the extent that this Court concludes that there is a connection between the 1995 Opinion Letter and the 1996 Stock Redemption Restructure Agreement, significantly, in the *AIA* litigation, Taylor actually moved for and obtained partial summary judgment on AIA's default of the $6 million promissory note (before Judge Brudie's illegality finding). R., p. 1838.

[8] To the extent that Taylor's claimed damages are not solely based on the contractual agreement underlying the Opinion Letter (*i.e.*, Riley, Turnbow and Eberle Berlin owe him what AIA did not pay him on the 1995 Stock Redemption Agreement, essentially $7.5 million dollars), it is acknowledged that Taylor's damage claims may not be wholly barred as a matter of law and may not be appropriate for summary judgment.

the Motions for Summary Judgment. Additionally, Turnbow and Eberle Berlin respectfully request that this Court reverse the district court and enter summary judgment on their behalf.

D. Subordination precludes Taylor's damage claim.

To the extent that this Court reaches this issue, any damage incurred by Taylor was proximately caused by his own action of executing the subordination agreement, as opposed to Riley's and Turnbow's conduct in 1995. This issue provides the Court with a legal alternative to the above proximate cause issue. If it addresses this issue, this Court should reverse the district court's denial of summary judgment and grant Turnbow's and Eberle Berlin's summary judgment motions.

ATTORNEY FEES

The Estate of Turnbow and Eberle Berlin should be entitled to attorney fees on appeal as the prevailing parties pursuant to Idaho Code § 12-120(3). *See Reynolds v. Trout Jones Gledhill Fuhrman, P.A.*, 293 P.3d 645, 650-651 (2013). Additionally, under Idaho law, "the prevailing party may be entitled to attorney fees for claims that are fundamentally related to the commercial transaction yet sounded in tort." *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 755-56, 274 P.3d 1256, 1270-71 (2012) (quoting *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728, 152 P.3d 594, 599 (2007)). In this case, a commercial transaction is integral to the claim. The fact that the claim against the Estate of Turnbow and Eberle Berlin sounds in tort does not preclude such an award.

Taylor's argument that "he should be awarded fees for the illegal commercial transaction between Taylor and AIA because Riley, Turnbow and Eberle Berlin acted in dual role of being general counsel for AIA and the authors of the opinion letter to Taylor" is wrong, completely

misplaced and not an issue on appeal. If this case is ever remanded to the district court for further proceedings, Taylor's attorney fee argument might be an appropriate argument for him to advance as a recoverable damage in his professional negligence claim, assuming such a claim even exists. However, Taylor's suggestion that in this appeal he should be awarded attorney fees and costs arising from the AIA litigation without first establishing the entire *prima facie* case for professional negligence is wholly without merit. Taylor's attorney fee argument for the *AIA* ligation must be disregarded by this Court.

CONCLUSION

In light of the limited scope of appellate review, this Court should not address or consider Taylor's arguments as to negligent misrepresentation as it relates to the independent cause of action under Idaho law or his issue of assumed duty/breach of fiduciary duty at this time. The Estate of Turnbow and Eberle Berlin respectfully request that decisions of the district court on duty, res judicata and the proximate cause of damages be reversed. Additionally, the Estate of Turnbow and Eberle Berlin respectfully request summary judgment be entered in their favor, with fees and costs as the prevailing party.

DATED this 27th day of November, 2013.

GJORDING FOUSER, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2013, two (2) true and correct copies of the foregoing Appellants' Reply Brief were served upon the following by email and U.S. Mail, postage prepaid:

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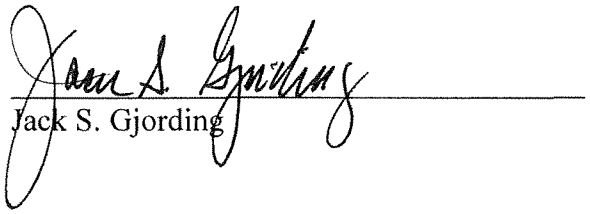

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